FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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MEILEN PRESS INC — N. Y. C. 219

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The United States in their filed Brief in this case stated:

> A third-party's action for indemnity requires proof that the act or omissions of the military were the proximate cause of the serviceman's injury and therefore is essentially identical in substance to a suit brought by the serviceman directly against the United States.

Brief of United States, p. 19. This claimed "identical" parallel between the suit brought by Stencel and the direct suit Donham is barred from bringing is the crux of the United States' argument in this case. The parallel fails in the one essential fact that makes these suits vastly different: Stencel *is not* a serviceman.[1]

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[1] The United States throughout its brief contends that "military" personnel issued the specifications requirements and com-

This fundamental difference in status is crucial in this case for it is Stencel's claim which must be evaluated in light of the Federal Tort Claims Act. Even in direct actions brought by servicemen the question of *their* status often determines the outcome of their actions. Thus, in *Brooks* v. *United States,* 337 U.S. 146 (1948) and *United States* v. *Brown,* 348 U.S. 110 (1954), the fact that the servicemen were not acting as servicemen when they were injured was sufficient to allow them to recover under the Federal Tort Claims Act. This Court, in those cases, did not consider whether the suits would involve the United States in extensive discovery procedures and litigation or whether there would be any disruption of military discipline. Yet, clearly, in both *Brooks* and *Brown* the conduct of military personnel was at issue.

The parallel between the claim in *Brown* and the claim in *Feres* v. *United States,* 340 U.S. 135 (1950) is strong. The difference was not that the injuries were not service-connected—they both were—but rather that the status of the claimants was different.

The same is true in the case at bar. Stencel's claim is based on the Government's negligence in its dealings with Stencel. Stencel was not then, and is not now a "serviceman", nor in any comparable position. By ignoring this basic fact, the Government's brief amounts to a relitigation of the *Feres* case.

The Government cites three rationales in *Feres* that it contends are applicable here: (1) the limited liability function of the veteran's compensation scheme; (2) military discipline; and (3) the federal character of the military. A review of these factors show that they are simply not applicable to Stencel's claim in this case.

ponents which caused Stencel's injury. There is no support in the record for such an allegation. It is far more probable that the contract between the United States and Stencel along with the provision of specifications, requirements, and components were performed by civilian personnel.

The limited liability function of the veteran's compensation acts is based on a *quid pro quo* between the Government and the serviceman. The serviceman surrenders all of his other remedies against the Government for the quick, sure, and ample compensation provided in exchange by the Government. Stencel is in no way involved in this *quid pro quo.* Since Stencel receives no consideration, it should not be compelled to surrender its legal rights. Simply put, the integrity of the veterans compensation scheme is circumvented at the moment when Stencel is sued by the serviceman.

What makes the Government's position ironic is that, if Stencel's claim is barred, the Government, despite its negligence, may be able to recover its medical payments to, and cost of treatment of, Donham from Stencel by virtue of a lien against Donham's recovery.[2] The unfairness of the Government's position becomes clear when it is realized that the Government, in a reverse situation, could sue Stencel in indemnity for damages the Government sustained as a result of Stencel's primary negligence.[3]

Thus, not only is the limited liability function of the veteran's compensation laws simply not available to Stencel, but the Government could recover its payments to Donham if the positions were reversed. Therefore, as be-

[2] Such a result was refused by this Court in *United States* v. *Standard Oil Co.,* 332 U.S. 366 (1947). However, subsequently Congress established just such a right by statute. See, 42 U.S.C. §2651.

[3] See *United States* v. *Yellow Cab Co.,* 340 U.S. 543 at 551, 552 (1951).

tween Stencel and the United States, there is no *quid pro quo* on which to base an argument for the integrity of the veteran's compensation scheme. Rather, the fact that the Government could sue in indemnity were they in Stencel's position argues strongly for allowing reciprocal rights in Stencel. If the serviceman can sue Stencel thereby disrupting the compensation scheme's *quid pro quo,* it is difficult to understand why Stencel should not be permitted to recover its damages when the cause giving rise to the damages is the Government's negligence.

The military discipline rationale is not applicable to the relationship between Stencel and the United States. However, the Government seeks to conjure up the spectre tha' every injured serviceman will sue the manufacturer of the nearest piece of equipment and thereby recover from the Government. The spectre must necessarily include the notion that the manufacturer will succeed on its indemnity claim on some basis related to military discipline, such as a field commander's negligent order. The Government asks us to believe that, if such suits are allowed, field commanders will be chilled by the knowledge that servicemen may seek damages from the Government later if they are injured because of the . ction of the field commander.

In fact, all of this is an illusion rather than a spectre. If the serviceman was injured as a result of negligent orders, he will not be able to recover from the manufacturer since those orders would be a complete defense to the serviceman's cause of action. Surely the Government is not contending that the Government: (1) should be allowed to create defective conditions in products with impunity; and (2) shift liability for such defective conditions to another. The provision of specifications, requirements and components, involved in this case, is not the sort of

conduct involving the judgments of military commanders for which the Government seeks or merits protection.

This Court seems to construe the military discipline rationale as a fear that a serviceman would confront his superiors in court and challenge their decisions in an adversarial proceeding, thereby detrimentally affecting military discipline. Such a rationale has no applicability to this case because decisions, involving government specification, requirements and components are not those kind of judgments. On the contrary, decisions involving the procurement and design of equipment for the serviceman's safety and survival should, of necessity, be studied, carefully considered judgments. To the extent that allowing Stencel to recover here deters careless and negligent decisions in this area, Stencel is at a loss to see how this is either wrong or disruptive of military discipline.

In arguing that the federal character of the military should apply to the indemnity claim of Stencel, the United States seems to suggest that, since the military is unique, all causes of action touching the military should be treated uniquely. This argument goes too far for, ultimately, it means that any case which might affect the various military functions by involving military men in litigation must for that reason be dismissed.

As the United States concedes, involvement of the military in civil suits *cannot* be prevented even if they are shielded from being named parties.

Yet, the United States argues that even this ineffective shielding of the military from civil litigation is enough to justify the dismissal of Stencel's claim. This Court has never seriously considered such a step. The *Brown* and *Brooks* decisions clearly show that, once the status of the claimant is established as other than a serviceman acting

as a serviceman, this Court has not deemed it relevant to consider any effect such suits would have on the military through involvement in civil litigation.

The Government's argument at length is reduced to the following: if a claim is brought, that if brought by a serviceman would be barred, it too must be barred. This is clearly wrong since many claims are routinely brought based on conduct by the Government that if brought by a soldier would be barred. The Government's argument transcends *Feres* and asks this Court to bar all claims having anything to do with the armed forces. However, the exceptions to the FTCA reveal that Congress certainly had no such intent for it lists specifically that "combatant activities" are excluded, thereby intending liability of the armed forces in other situations.

The Government has been evaluating the claim Donham *cannot* bring, rather than evaluating Stencel's claim in order to determine whether there is congressional intent to exclude the claim. There is no evidence whatever that Congress ever intended that a private corporation could not recover damages occasioned by the negligence of the United States in its dealings with the corporation, merely because the damages include injuries to a serviceman. Nor does the Government purport to have found such evidence. Because of this the Government's argument must fail for it concedes on the first page of its Argument that this is the burden it must meet.

CONCLUSION

The judgment of the court below should be reversed and the cause remanded with instructions to deny the motion of the United States to dismiss the cross-claim of petitioner for indemnity against the United States.

Respectfully submitted,

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March 9, 1977

Affidavit of Service

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 9th day of March 1977, served three copies of the foregoing Reply Brief of Petitioner upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
9th day of March, 1977

/s/ LAWRENCE MENTZ
Notary Public

LAWRENCE MENTZ
Notary Public, State of New York
No. 31-4513579
Qualified in New York County